No. 89-497

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In The

Supreme Court of the United States

October Term, 1989

HARRIS COUNTY FLOOD CONTROL DISTRICT, ET AL.,

Petitioners,

v.

CARL JOHNSTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can an employer avoid Title VII liability for a retaliatory discharge by asserting that the employee is racially discriminatory, even though two courts have found that basis pretextual?

2. Can an allegation of retaliation for testimony at an Equal Employment Opportunity hearing give rise to a First Amendment action under 42 U.S.C. § 1983 in addition to an action under Title VII?

3. Does a public employee enjoy the protection of the First Amendment for truthful, compelled testimony at an official governmental fact-finding hearing?

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The Respondent, Carl Johnston, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 869 F.2d 1565 (1989).

STATEMENT OF THE CASE

Carl Johnston, the Respondent in this case, began working for Harris County Flood Control District (HCFD) as an hourly laborer in 1950. By 1977, Johnston had advanced to a supervisory position; he continued to work in that capacity until HCFD terminated his employment in 1981. Johnston's position at HCFD was secure throughout those thirty years.

In 1980, Marilyn Speed, another HCFD employee, filed an Equal Employment Opportunity ("E.E.O.") charge against HCFD. The Harris County Commissioners Court called an Equal Employment Opportunity hearing to review Ms. Speed's allegations, and summoned Johnston to testify. At the official hearing on July 24, 1980, Mr. Johnston testified under oath that Speed had been a satisfactory employee. The Commissioners Court subsequently ordered Speed reinstated, with full seniority and longevity.

Immediately after the hearing, HCFD lashed out at Johnston with a series of retaliatory employment actions. HCFD curtailed Johnston's responsibilities; took away his office; singled him out for denial of a cost-of-living raise; required him to perform menial tasks; pressured other employees to ostracize him; and, finally, attempted to

force him to accept a formal demotion. When Johnston refused the demotion, HCFD terminated his employment.

Johnston then filed this action against HCFD and its individual directors, alleging that their retaliation violated his rights under both Title VII and the First Amendment. HCFD, in defense, offered what it claimed were non-retaliatory justifications for firing Johnston.

The district court rejected those justifications as pretextual, finding that "[HCFD's] wrongful acts were at all times in retaliation for [Johnston's] testimony at the EEO hearing." Memorandum and Order of December 16, 1986, (reprinted as Appendix D of Petitioners' brief), Finding of Fact No. 19. The court thus found HCFD liable under both 42 U.S.C. §1983 (First Amendment) and 42 U.S.C. §2000e-3(a) (retaliation). The Fifth Circuit affirmed the district court's findings of liability under both provisions. *Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1571-1578 (5th Cir. 1989).

REASONS FOR DENYING CERTIORARI

I.

AN EMPLOYEE CANNOT AVOID TITLE VII LIABILITY FOR A RETALIATORY DISCHARGE BY ASSERTING THAT THE EMPLOYEE IS RACIALLY DISCRIMINATORY, PARTICULARLY WHERE THE TWO COURTS BELOW HAVE FOUND THAT BASIS PRETEXTUAL.

A.) Petitioners' Claim

The defendants' claim – that the opinions below will hinder employers from disciplining discriminatory or otherwise bad faith supervisors – is frivolous.

B.) No Impediment

Neither the District Court nor the Court of Appeals created even the slightest impediment to employers relieving supervisors for reasons other than illegal retaliation. Rather, both Courts clearly held, that whatever Mr. Johnston's racial problems may have been, these problems formed no part of the basis for his termination. *Johnston*, 869 F.2d at 1572.

> We express no opinion whether Johnston's racial biases would have provided permissible grounds for firing him or whether HCFD employees would have a colorable Title VII claim based on Johnston's racial biases. Neither of those cases is before us. In the case that is before us, an employer tolerated a supervisor whose racial attitudes and practices created difficulties in the work force. When it became desirable to terminate the supervisor, his racial attitudes suddenly became intolerable. HCFD had accepted Johnston's attitudes and the liability risk they created for many years. The trial court could easily conclude that, having done so, HCFD cannot now cloak itself in principles of nondiscrimination – principles which it once chose to ignore – in an effort to shield itself from Title VII liability. We affirm the district court's finding that HCFD violated §704(a) of Title VII.

Johnston, 869 F.2d at 1573.

C.) Intent as Evidence

Intent, such as the retaliatory intent attributed to HCFD here, is intrinsically a question of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). The holding of the District Court was found reasonable by the Court of

Appeals. *Johnston*, 869 F.2d at 1572. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-574 (1985).

D.) Two Court Rule

It has long been the rule that the Supreme Court does "not grant certiorari to review evidence." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Where as here, both Courts below have concurred in a fact finding, this Court inevitably denies review "absent some extraordinary reason for undertaking this task." *Goodman v. Lukens Steel Co.*, ___ U.S. ___, 107 S.Ct. 2617, 2623 (1987), citing *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

E.) No Extraordinary Review

The instant petition closely parallels that filed in *Goodman*. In *Goodman*, the petitioners asserted that the district court's opinion rested on an erroneous legal premise. This Court stated: "We need not discuss this rather abstract observation, for the [district] court went on to say that the evidence proves 'far more' " than alleged by the petitioners, *Goodman*, 107 S.Ct. at 2623, and

the Court of Appeals affirmed. *Goodman*, 107 S.Ct. at 2624. Likewise, here both the District Court and the Fifth Circuit found "far more" than that Mr. Johnston had a history of strained relations with minority employees. "Rather, the court concluded that Johnston was competent, albeit not perfect, a plausible view of the evidence that we decline to disturb as clear error."[1] *Johnston*, 869 F.2d at 1572.

Since the HCFD has pointed to no "extraordinary reason" for undertaking review, and the record reveals none, this Court should deny the petition. *Goodman*, 1075 S.Ct. at 2623.

II.

AN ALLEGATION OF RETALIATION FOR TESTIMONY AT AN EQUAL EMPLOYMENT OPPORTUNITY HEARING GIVES RISE TO A FIRST AMENDMENT ACTION UNDER 42 U.S.C. §1983 IN ADDITION TO AN ACTION UNDER TITLE VII.

A.) Petitioners' Claim

The Court below held that the plaintiff had a cause of action against HCFD under 42 U.S.C. §2000e-3(a) for retaliation as well as a claim under the First Amendment for violations of Respondent's free speech rights by these governmental defendants. The Petitioners argue that, because the same set of facts give rise to plaintiff's First

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[1] "HCFD did not fire Johnston until he engaged in a practice that embarrassed HCFD, itself; HCFD cannot now hide behind its belated and feeble efforts to eliminate discrimination in the workplace in an effort to escape Title VII liability." *Johnston*, 869 F.2d at 1573.

Amendment claim and his Title VII is his exclusive source of relief. This argument is contrary to well-established federal jurisprudence.

B). Dual Causes of Action

A plaintiff may bring a claim both under Title VII and 42 U.S.C. §1983, so long as the Section 1983 claim is based upon a separate constitutional right or statute from Title VII. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974).

In *Alexander*, the Court analyzed the legislative history of Title VII and found that it was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. *Alexander*, 415 U.S. at 48-49. Or, as held in *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975), the "legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."

> Since 1871, when it was passed by Congress, §1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights. Nevertheless, § 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. The crucial consideration is what Congress intended.

Smith v. Robinson, 468 U.S. 992, 1012 (1984) (citations omitted). Given the holding in *Alexander*, there can be no doubt as to Congress' intent in the passage of Title VII.[2]

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[2] Because Congressional intent to create dual liability is clear *Middlesex City Sewerage Authority v. National Sea*

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C.) Dependent Claims

Great American Federal Savings and Loan Association v. Novotny, 442 U.S. 366 (1979), is not to the contrary. *Novotny* does not speak to cases involving constitutional claims based upon rights that exist independent of Title VII.[3] Rather, *Novotny* involves a plaintiff's attempt to create a conspiracy cause of action against a private employer under 42 U.S.C. §1985(3) but arising out of Title VII. *Novotny*, 442 U.S. at 372. Section 1985(3) may not be invoked to redress violations of Title VII because Section 1985 creates no substantive rights itself but (as a purely remedial statute) provides a civil cause of action when some otherwise defined federal right is breached by a conspiracy. *Novotny*, 442 U.S. at 370-72. Because his claim was a claim against a private employer, Mr. Novotny could point to no other "statutory" or constitutional provision that was violated other than Title VII.

The *Novotny* court simply ruled that a plaintiff cannot avoid the procedural rigors of Title VII by claiming that he is not bringing a Title VII case but rather is maintaining a "conspiracy to violate Title VII" case. *Novotny*, 442 U.S. at 375-76. On the other hand the *Novotny* Court was very clear to announce that "this case . . . does not involve two 'independent' rights . . ." *Novotny*, 442 U.S. at 378.

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Clammers, 453 U.S. 1, 19-20 (1981) is inapposite. See *Maine v. Thiboutot*, 448 U.S. 1 (1980).

[3] See *Novotny*, 442 U.S. at 377, n.21.

D.) Independent Claims

The present case, by contrast, does involve two independent rights created by two independent sources: First, the right of free speech guaranteed by the First Amendment; and second, rights guaranteed by Section 704 of Title VII, 42 U.S.C. § 2000e-3. In the companion circumstance of Title VII and §1981 this Court has only recently reaffirmed that "where [Title VII and §1981] do in fact overlap we are not at liberty 'to infer any positive preference for one over the other.' "[4] *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363, 2375 (1989).

In sum, the Petitioner's argument fails because, unlike the plaintiff in *Novotny*, Mr. Johnston is asserting two independent rights: (1) his free speech right to speak out against acts of discrimination; and (2) his right to be free from retaliation under 42 U.S.C. 2000e-3(a). Because these rights flow from different constitutional and statutory sources, they are independent of each other and may be asserted together, even though the same facts give rise to both causes of action.

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[4] Not only does Title VII not preclude enforcement of independent federal claims, it "expressly preserves nonconflicting state claims in its §708." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101 (1983).

III.

A PUBLIC EMPLOYEE ENJOYS THE PROTECTION OF THE FIRST AMENDMENT FOR TRUTHFUL, COMPELLED TESTIMONY AT AN OFFICIAL GOVERNMENTAL FACT-FINDING HEARING.

A.) Legal Standard

A governmental employee does not surrender his/her right to freedom of speech under the First Amendment when accepting governmental employment. Such employment cannot be conditioned upon the forfeiture of First Amendment rights even where the employee has no property interest in the employment. They may not be compelled to relinquish First Amendment rights that "they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public [agencies] in which they work." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Perry v. Sinderman*, 408 U.S. 593 (1972).

In the workplace the question of First Amendment protection revolves around whether the employee's expression is compatible with the nature of his employment. To establish that it is incompatible, the employer must prove that the working relationship between the employer and the employee was so intimate and personal that public criticism would undermine the effectiveness of the working relationship. Only if the employer meets that burden may a court uphold a restriction upon, or deprivation of, an employee's First Amendment rights. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285 (1977).

The employer is entitled to show that it has a legitimate interest in maintaining discipline and efficiency in delivering public services. *Connick v. Myers*, 461 U.S. 138 (1983). *Connick* outlines the appropriate questions to balance these concerns.

(1) Was the expression at issue one of significant public concern?

(2) Did the employee's expression impede his ability to perform his duties?

(3) What were the time, place and manner considerations at stake?

(4) What was the employee's motive for expression and the context of the expression?

Connick v. Myers, 461 U.S. at 151-54. See also *Mount Healthy*, 429 U.S. at 287.

"The threshold question in applying this balancing test is whether [the employee's] speech may be 'fairly characterized as constituting speech on a matter of public concern.' "[5] *Rankin*, 483 U.S. at 384. This threshold issue is the only substantive defense that Petitioners assert against Mr. Johnston's First Amendment claim.

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[5] This is not to say, however, that only public speech is protected by the First Amendment. As *Rankin*, citing *Connick*, makes clear, even private speech is afforded a considerable umbrella under the constitution. "Even where a public employee's speech does not touch upon a matter of public concern, that speech is not 'totally beyond the protection of the First Amendment,' but 'absent the most unusual circumstances a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency

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B.) Petitioners' First Contention

The speech in question here consists of statements made by Mr. Johnston before a formal E.E.O. hearing conducted by the Harris County Commissioners Court. The hearing itself was pursuant to county policy at the request of an HCFD employee named Marilyn Speed. Mr. Johnston was not a party to this hearing but rather was required by his employer to appear as a witness. Petitioners conceded that Mr. Johnston's testimony was wholly truthful[6] and nondisruptive of the workplace[7].

Petitioners simply assert that this information is not of public concern. "In the case at bar, the closed hearing conducted by the Commissioners Court, in its capacity as the governing body of the Flood Control District, did not pertain to a matter of public concern but was merely an intergovernmental concern of an individual employee –

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allegedly in reaction to the employee's behavior.' " *Rankin*, 483 U.S. at 384, n.7 (citation omitted). As plaintiff will demonstrate, *infra*, he was fired not for improper behavior but rather for his exercise of his right to freedom of speech.

[6] Where comments of public concern are substantially correct they generally cannot furnish grounds for dismissal, *Pickering*, 391 U.S. at 570, even where the speaker acts with improper motive. *Harte-Hanks Communications, Inc. v. Connaughton*, ___ U.S. ___, 109 S.Ct. 2678, 2684 (1989).

[7] Non-inflammatory statements made in response to a formal request cannot be considered disruptive. *Cf. Connick*, 461 U.S. at 154; *Givhan v. Western Lines Consolidated School District*, 439 U.S. 410, 415, n.4 (1979).

Marilyn Speed." Petitioners' Brief at p.18. This argument fails.[8]

1.) Context

First, Petitioners' argument that the Circuit Court's decision misinterprets *Rankin*'s use of the term "context" is fundamentally flawed. Mr. Johnston not only concedes but endorses Petitioners' claim that "[i]n using the term 'context' in *Rankin*, this court referred to the subject matter of the discussion in which the disputed speech occurs."[9] Petitioners' Brief at 17-18. However, *Rankin* also goes further and, quoting *Connick*, 461 U.S. at 147-48, expressly incorporates the "context" issue into the underlying determination of whether a matter is, in fact, one of public concern. " 'Whether an employee's speech addresses a matter of public concern must be determined by the content, form and *context* of a given statement as revealed by the whole record.' " *Rankin*, 483 U.S. at 384-85 (emphasis supplied). Thus, when the Court below held that "[w]here an employee testifies before an official government adjudicatory or fact-finding body he speaks in a

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[8] Whether the hearing is open to the public or closed except to the participants and witnesses is not dispositive of the issue of public concern. *Givhan*, 439 U.S. at 413-416.

[9] Indeed, as the *Rankin* Court indicated, the employee's speech "will not be considered in a vacuum; the manner, time and place of the employe's expression are relevant, as is the context in which the dispute arose" in balancing the state's interest in promotion efficiency against the employee's right to speak out on matters of public concern. *Rankin*, 483 U.S. at 388.

context that is inherently of public concern", *Johnston*, 869 F.2d at 1578, it did not err. Rather, it faithfully followed this Court's dictates as set out in its established First Amendment jurisprudence.

2.) Due Process

Second, while a governmental institution is not generally required to provide hearing mechanisms for (non tenured) employee grievances, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), where it does so it must conform to the requirements of First Amendment due process. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) ("It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments.") To punish the Respondent under the facts of this case is surely to deprive him of due process.

3.) Forum

Third, this is not an attempt to constitutionalize a governmental employee's grievance as condemned in *Connick*, 461 U.S. at 146. Indeed, the E.E.O. mechanism was established and put in place by the governmental agency to provide itself with a factual record and assure that it was not violating federal law,[10] Mr. Johnston had no personal stake in its outcome. This is in direct contrast to *Connick*, where the plaintiff's intent was merely "to

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[10] See 42 U.S.C. § 2000e-5(c).

gather ammunition for another round of controversy with her superiors." *Connick*, 461 U.S. at 148[11]

While an employee cannot "require a public office to be run as a roundtable for employee complaints over internal office affairs," *Connick*, 461 U.S. at 149, neither can the public office solicit, entice or compel an employee to provide an honest opinion on a matter of public concern (such as sex discrimination) and then terminate the employee for doing so. See *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). That is, having created a limited public forum, HCFD could not then punish Mr. Johnston for the appropriate, truthful and nondisruptive use of that forum no matter how parochial his statements. *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (A forum can be created by a state statute providing for open meetings.)

Even if the EEO hearing is considered a non public forum, HCFD could not reasonably punish Mr. Johnston. "Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise

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[11] This record is devoid of evidence from which to suggest that Mr. Johnson "threatened the authority of the employer to run the office." *Connick*, 461 U.S. at 153. In fact, Mr. Johnston could only be said to threaten such authority if he had refused to testify.

includible subject." *Cornelius v. NAACP Def. and Ed. Fund*, 473 U.S. 788, 806 (1985) (Citations omitted). Mr. Johnston was ordered by the County to appear and testify. It cannot thereafter terminate him for such testimony and meet the *Cornelius* reasonableness test. *Cornelius*, 473 U.S. at 809. A non-public forum cannot be a "First-Amendment-free zone". *Board of Airport Commissioner v. Jews for Jesus, Inc.*, 482 U.S. 569, 576, (1987).

It is a moral duty of citizenship to provide properly constituted governmental bodies with factually accurate information upon request. This duty is not less rigorous for public employees than it is for private citizens.[12] Having created such a forum, the county cannot place disinterested employees in the precarious position of requiring their attendance, administering the oath to them, demanding truthful testimony and then seeking to punish for that very testimony.[13] In a similar situation,

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[12] While this Court's "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state." *Connick*, 461 U.S. at 17. But the reverse must be equally true. Where a governmental employee testifies truthfully at the request of his employer he cannot later be stripped of his citizen's right to free speech simply because he is so employed. *Cf. Moore v. City of Kilgore*, 877 F.2d 364, 371, n.3 (5th Cir. 1989).

[13] It is certainly ironic that Petitioners complain of Mr. Johnston's factually accurate testimony. The gist of their complaint seems to be that Mr. Johnston did not express his personal opinions as to sex discrimination at the EEO hearing. Not

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this Court has concluded that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interests cannot outweigh an individual's First Amendment right to avoid becoming the courier of such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). Neither may Mr. Johnston be required to perjure himself or suffer termination. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or in other matters of opinion or force citizens to confess by word or act their faith therein.")

4.) Witness Immunity

Fourth, witnesses have generally been held immune from sanction (other than by criminal charges of perjury) for their sworn testimony. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325 (1983). Of course, one can argue that *Briscoe* can be distinguished on the grounds that the rule of immunity there set out is one of defense only or that it can rise to a First Amendment due process violation only in a judicial context. Neither distinction is sustainable.

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only was the very nature and title of the EEO hearing sufficient to place any reasonable witness on notice as to the discrimination claims underlying this matter but Mr. Johnston, under the specific questions asked of him by the county hearing officer, as well as the rules of evidence, was precluded from providing his lay opinion on such issues. Tex. R. Civ. Evid., Rule 701. Nevertheless, the County Attorney now seeks to strip him of First Amendment rights, solely because Mr. Johnston did not willfully interject nonresponsive answers to those questions.

Witness immunity, either in the *Briscoe* context or the one found here, is fundamentally important to protect the integrity of any adjudicatory process, whether it is judicial or administrative.

> "[T]he claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. Even within the constraints of the witness' oath there may be various ways to give an account or to state an opinion. These alternatives may be more or less detailed and may differ in emphasis and certainty. A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.

Briscoe, 460 U.S. at 322-33, (citations omitted).

This same rationale supports the ruling in question here. "We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state."[14] *Johnston*, 869 F.2d at 1578. No

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[14] Put another way, HCFD cannot attempt to control its employees' thoughts. *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (the state "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.") Nor can it compel an employee to divulge those thoughts in a proper manner and then retaliate against him.

practical distinction exists between the reluctance of a witness to submit his personal fisc to the whims of a damage action of the one hand and the loss of his or her major source of income – that is, employment – on the other.[15]

The second noted distinction, that due process protection is only afforded in judicial settings, has long been laid to rest. *Cf. Tumey v. Ohio*, 273 U.S. 510, 522 (1927) (governmental officers, whether acting in judicial or quasi-judicial capacity, can violate due process). Not only does the logic in *Briscoe* reject such a claim but this court has denied such a distinction in the free speech realm. *Perry v. Sindermann*, 408 U.S. 593 (1972).[16] Moreover, the

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[15] To the extent that an employee does not rely upon his/her employment as the sole source of income, the coercive power of a threat of termination is mitigated. The court below accounted for this variation in its opinion. *Johnston*, 869 F.2d at 1578 ("those able to risk job security would suffer state-sponsored retaliation for speaking the truth" but those "unable to risk unemployment would scuttle our efforts to arrive at the truth.")

[16] As stated in *Connick:*

> Our cases following Pickering also involved safeguarding speech on matters of public concern. The controversy in *Perry v. Sindermann* . . . arose from the failure to rehire a teacher in the state college system who had *testified before committees of the Texas legislature* and had become involved in public disagreement over whether the college should be elevated to 4-year status – a change opposed by the regents.

Connick, 461 U.S. at 145 (emphasis supplied).

hearing in question here cannot be regarded as a mere local governmental administrative proceedings. Under 42 U.S.C. Section 2000e-5(c), HCFD's hearing is an integral part of Title VII enforcement. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 101 (1983) ("State laws obviously play a significant role in the enforcement of Title VII.") Thus, if a local governmental entity may terminate an employee for truthfully testifying at a local EEO-type hearing, 'the meaning and enforceability of the congressional policy behind Title VII will be largely short-circuited.

C.) Petitioners' Second Contention

Petitioners decline to expressly define the concept of public concern. However, such a definition plainly exists.

> The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present. See Restatement (Second) of Torts Section §642D (1977). See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (action for invasion of privacy cannot be maintained when the subject matter of the publicity is matter of public concern); *Time, Inc. v. Hill*, 385 U.S. 374, 387-388 (1967).

Connick, 461 U.S. at 143, n 5.

As the Restatement points out: "To the extent that the constitutional definition of a matter that is of legitimate concern to the public is broader than the definition given in any State, the constitutional definition will of course control". Restatement (Second) of Torts §652d comment d (1977). And, as stated in *Cox:* "The special protected

nature of accurate reports of judicial proceedings has repeatedly been recognized." *Cox*, 420 U.S. at 492.

Likewise, Ms. Speed's claim of discrimination (whether ultimately supported by the hearing record or not) is clearly of public concern, and so is the Respondent's truthful, sworn testimony at the hearing (whether related to his opinion on the equal opportunities of women or to the more factually-specific evidence related to Ms. Speed's performance as an HCFD employee).[17] *Cf. Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (public concern is met where the primary reason for dismissal was criticism of school board's practices and policies which plaintiff considered to be racially discriminatory).

1.) Connick Not Applicable

Any fair reading of *Connick* will demonstrate that it was never intended to apply in circumstances such as the current one. Mr. Johnston is neither seeking to "constitutionalize" an employee grievance nor to mandate, under

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[17] As in the analogous circumstance found in *Cox*, Harris County established a formal procedure to place information before the Harris County Commissioner's Court for the administration of government. It must be presumed that the public interest was thereby served, *Cox*, 420 U.S. at 495, and therefore, that the information provided was of public concern. *Connick*, 461 U.S. at 143, n.5. "When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971). Even where it can establish such an interest it is not free, without more, to punish the speaker.

the guise of the First Amendment, a right to a grievance procedure. *Connick*, 461 U.S. at 154. The "public concern" language which runs throughout this court's public employee First Amendment jurisprudence "reflects . . . the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143 (footnote omitted). But, it also does not allow such offices to create a formal grievance procedure, compel a disinterested employee's sworn, truthful testimony and then punish that employee for speaking.[18]

2.) **Factual Statements**

Nor does the fact that Mr. Johnston's statements were purely factual – as distinguished from opinion testimony related to Mr. Johnston's belief in the appropriateness of sex discrimination in county jobs – deprive his remarks of First Amendment protections. " 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or

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[18] HCFD may be in the position to require employees to submit complaints about the operation of the District to narrowly drawn grievance procedures for action prior to taking such complaints public. *Pickering*, 391 U.S. at 572, n.4. If so, the Petitioners' position is that such employees can be terminated for statements at such a hearing – because they are not of public concern – or if taken public by the employee without benefit of a prior grievance for violation of the grievance procedure itself. Such duality cannot be tolerated. *Rankin*, 483 U.S. at 326, n.10 ("A public employer may not divorce a statement made by an employee from its context by requiring the employee to repeat the statement, and use that statement standing alone as the basis for a discharge.").

appropriate to enable the members of society to cope with the exigencies of their period.' " *Time, Inc. v. Hill*, 385 U.S. 344, 388 (1967), citing *Thornhill v. Alabama*, 310 U.S. 88, 102 (1941). Even had the plaintiff believed that sex discrimination was proper he nonetheless would be expected to provide factually correct information upon request. This is precisely the type of information that the Harris County Commissioners needed and were entitled to, and it is what they got. Both Courts below found this testimony to be of public concern.[19]

D.) Petitioners' Third Contention

Although Petitioners claim that the cause *sub judice* is in conflict with *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d at 75 (4th Cir. 1988) (Petitioners' Brief at p. 19, n.4), the two opinions can be harmonized. To the extent they are interpreted as conflicting, *Arvinger* is clearly wrong.

1.) False Statements

First, and foremost, the plaintiff in *Arvinger* was "fired for lying." *Arvinger*, 862 F.2d at 77. Thus, the Fourth Circuit was squarely faced with a question left open in *Pickering*. "Because we conclude that appellant's

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[19] Review by this Court "is limited in this context by [its] constitutional obligation to assure that the record supports this conclusion". *Rankin*, 483 U.S. at 325. Even then "credibility determinations are reviewed under the clearly erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses' ". *Connaughton*, 109 S. Ct. at 2696.

statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment." *Pickering*, 391 U.S. at 574, n.6. The opinion makes quite clear that substantial evidence existed to support this ground for termination. *Arvinger*, 862 F.2d at 76-77. Clearly, the panel's belief[20] that the employee's speech was untruthful and "made solely to further the interests of Mr. Arvinger" and another employee resulted in its determination that "[i]t was not made to further the public debate on employment discrimination . . . or any other topic." *Arvinger*, 862 F.2d at 79. In other words the employee's statements were "so without foundation as to call into question his fitness to perform his duties" under the *Pickering* analysis. *Pickering*, 391 U.S. at 573, n.5.

Such an employee, while having full right to communicate with an EEO investigator, is surely not entitled to lie about work-related matters and retain the confidence of his employers. This is a far cry from the factual array presented by the instant cause of action. Defendants here

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[20] The District Court ruled, as a matter of law, that the plaintiff's statement to a Baltimore Community Relations Commission investigator was about a matter of public concern, and that the defendants had failed to prove that the statement was disruptive or in any other way impaired the department's operation. *Arvinger*, 862 F.2d at 77. Apparently the Fourth Circuit reversed this finding based upon its duty to independently review the record and arrive at a conclusion on this matter. *See Rankin*, 483 U.S. at 325.

have asserted not a single fact or defense to impinge on plaintiff's veracity or to indicate that Mr. Johnston's job performance was impaired by his testimony. "Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here." *Pickering*, 391 U.S. at 570.

2.) Forum

Secondly, there are distinctly different conceptual concerns between a formal hearing and an informal communication with an investigator. A formal EEO hearing clearly meets the criterion for a limited public forum under *Perry*, 460 U.S. at 45-49. *But see Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280-84 (1984).

Even if such a hearing is considered a non-public forum for purposes other than the information sought by the hearing officer, Mr. Johnston so plainly limited his statements to germane issues that terminating him for such speech would be unreasonable under *Cornelius*, 473 U.S. at 809-10. Likewise, it is obvious that HCFD's interest in limiting Mr. Johnston's opportunities to factually contribute to the debate on sex discrimination at this EEO hearing is not significantly greater than its interest in limiting a similar contribution by any equally knowledgeable member of the general public.[21] *See Pickering*, 391

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[21] That is not to say that all members of the general public would be entitled to speak at such a hearing. However, when authorized or requested to speak, such a witness cannot thereafter be denied state sponsored rights or benefits for truthful statements. See generally *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

U.S. at 568. In the context of such a hearing due process precludes such limitations. *Barnette*, 391 U.S. at 642. Thus, as a matter of law, HCFD cannot meet *Cornelius'* reasonability test. *Cornelius*, 473 U.S. at 809. Even if it could "[t]he existence of a reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius*, 473 U.S. at 811. Clearly, to terminate an employee for requested, truthful testimony because that testimony was embarrassing is "viewpoint-based". In any case regulation under *Perry* is only concerned with the speech of those outside the institution, not those within. "[O]bviously [as to employees, regulation of speech] must be drawn more narrowly than regulations on the speech of outside representatives." *Texas State Teachers Association v. Garland I.S.D.*, 777 F.2d 1046, 1053 (5th Cir. 1989), rehearing denied, 784 F.2d 1113, aff'd 479 U.S. 801 (1986).

3.) Public Concern

Third, *Connick's* primary admonition is to separate public employees' free speech rights from attempts to "constitutionalize" employees' grievances. *Connick*, 461 U.S. at 154. This balance is struck between *Arvinger* and *Johnston*. It is clear from the totality of circumstances, or in the court's terms "the content, form, and context of a given record", *Rankin*, 483 U.S. at 384-85; *Connick*, 461 U.S. at 147, that while *Arvinger's* statements were wholly private and personal, Mr. Johnston's were not.

4.) Conflict

To the extent that these two cases must be said to create inconsistent legal principles, *Johnston* must prevail.

The Fourth Circuit's insistence "that 'content, subject-matter, is always the central aspect' " in determining the public concern value of speech, *Arvinger*, 862 F.2d at 79, puts it at odds with *Rankin*, 483 U.S. at 384-85, and *Connick*, 461 U.S. at 147-48. To the extent *Arvinger* undercuts the reasonableness standard articulated in *Cornelius*, 473 U.S. at 809, it is equally suspect. If *Arvinger* is said to hold that state-sponsored retaliation for compelled sworn testimony at an official governmental fact finding hearing is constitutional, it runs afoul of the compelling rationale found in cases such as *Reeves v. Claiborne County Board of Education*, 828 F.2d 1096, 1100 (5th Cir. 1987).

CONCLUSION

For all of the foregoing reasons the petition for a writ of certiorari to review the opinion of the Fifth Circuit Court of Appeals should be denied.

Respectfully submitted,

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